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No. 92-128

In the Supreme Court of the United States

OCTOBER TERM, 1992

LESLIE N. BEDELL, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a catering business supplying cooks to boats that provide offshore maintenance services to oil companies is excluded from the requirements of the Fair Labor Standards Act (FLSA) as a "mom and pop" establishment simply because the business operates from a home office, and the only employees working at that office are the owner and his immediate relatives.

2. Whether cooks are seamen exempt from the overtime-pay requirements of the FLSA if more than 20 percent of their time is spent preparing meals for individuals who are non-seamen performing oil-well service work.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 955 F.2d 1029. The decision of the district court (Pet. App. 13a-19a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1992. A petition for rehearing was denied on April 21, 1992. The petition for a writ of certiorari was filed on July 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act (FLSA or the Act), 29 U.S.C. 207(a)(1), requires statutory overtime rates to be paid to employees who are "employed in an enterprise engaged in commerce or in the production of goods for commerce." Under the Act, the term "[e]nterprise" means "related activities performed (either through unified operation or common control) by any person * * * for a common business purpose," 29 U.S.C. 203(r) (1988), and, at all times relevant to this proceeding, the phrase "[e]nterprise engaged in commerce or in the production of goods for commerce" meant an enterprise "whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated)." 29 U.S.C. 203(s)(1) (1988).

The FLSA contains a so-called "mom and pop" exclusion, which provides that "[a]ny establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner" will not be considered to be an enterprise subject to the requirements of the Act. 29 U.S.C. 203(s)(2) (1988). That provision further states that "the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection." *Ibid.* A long-standing interpretive bulletin issued by the Secretary of Labor defines an "establishment" as a "'distinct physical place of business' rather than * * * 'an entire business or enterprise' which may include several separate places of business." 29 C.F.R. 779.23. The Secretary's regulations also recognize that an enterprise may consist of a single establishment, or many different establishments. See 29 C.F.R. 779.203 and 779.204(b).

2. Petitioner Blue Water Marine Catering, Inc. (Blue Water) operates a catering business that supplies cooks to "jack-up boats" rendering maintenance services to oil fields off the coast of Louisiana. Pet. App. 2a, 14a. Petitioner Leslie N. Bedell is president of Blue Water. *Id.* at 2a. Bedell operates his business out of an office located in his home in Gretna, Louisiana. *Id.* at 5a, 17a. The only other employees of Blue Water physically located at the Gretna office are Bedell's wife and her daughter. *Id.* at 4a, 17a. All sales of Blue Water's catering services are initiated from the home office, and payment for services is received there. *Id.* at 5a, 17a.

In contrast to Bedell and his family, Blue Water's cooks and galley hands report to work at, and are paid at, remote locations, rather than the Gretna office. Pet. App. 17a. During the time period relevant to this case, Blue Water paid its cooks a "day rate" for their services on the jack-up boats. *Id.* at 2a.

Blue Water's cook-employees prepare meals on the jack-up boats for consumption by its customers' employees. Pet. App. 14a. It is undisputed that all of Blue Water's employees were part of a single enterprise within the meaning of the Act, and that during the relevant period, Blue Water had an annual gross volume of sales made or business done of at least $250,000. *Id.* at 15a.

3. Respondent brought suit against petitioners in the United States District Court for the Eastern District of Louisiana, claiming that petitioners violated the FLSA by failing to pay overtime wages to Blue Water's cooks. After a bench trial, the district court found that neither the cooks as individuals nor Blue Water as an enterprise was subject to the FLSA. Pet. App. 13a-19a.

The district court first held that the "mom and pop" exclusion applied to Blue Water. Pet. App. 17a-18a. Relying on the Secretary's interpretive bulletin defining the term "establishment," 29 C.F.R. 779.23, the court

concluded that the Gretna office was a separate establishment within the meaning of the Act. Pet. App. 18a. The court further found that, while petitioners' cooks and galley hands are employees of the Blue Water enterprise as a whole, they are not employees of the Gretna establishment because they never set foot inside the Gretna establishment and work and are paid at separate establishments (*i.e.*, the jack-up boats). *Id.* at 17a-18a. Thus, the "only regular employees" of the Gretna establishment were Bedell and his family. *Id.* at 17a. Since all of the sales of the Blue Water enterprise were generated from the Gretna establishment, and could not be attributed to the jack-up boats, the court concluded that the "mom and pop" exclusion was applicable. *Id.* at 18a.

The district court then rejected petitioners' contention that the cooks were exempt from the overtime provisions of the Act because they were seamen within the meaning of 29 U.S.C. 213(b)(6), which provides that overtime pay is not required for "any employee employed as a seaman." Pet. App. 18a-19a. The court observed that 29 C.F.R. 783.32 defines seamen as "members of the crew, such as 'cooks,'" and that the cooks' work of feeding the crew is "essential to the operation of the vessel." Pet. App. 18a. In addition, the court noted that the cooks are "subject to the authority, direction, and control of the master of the vessel" while on the jack-up rigs. *Id.* at 18a-19a. Nonetheless, the court concluded that petitioners' cook-employees were not employed as seamen within the meaning of the Act because they do not perform a "service which is rendered primarily as an aid in the operation of a vessel as a means of transportation." *Id.* at 19a (citing *Dole* v. *Petroleum Treaters, Inc.*, 876 F.2d 518, 521 (5th Cir. 1989)).

4. The court of appeals reversed in part and remanded in part. Pet. App. 1a-12a. Turning first to the question

whether petitioners qualified for the "mom and pop" exclusion, the court held that the district court erred in holding that the cooks were not employees of the Gretna establishment merely because they never set foot in that establishment. *Id.* at 6a-7a. The court reasoned that "[t]he question whether someone is the regular employee of an establishment * * * is answered according to economic reality, applied through factors with which this and other courts have attempted a legal definition of 'employee.'" *Id.* at 6a-7a. Under that test, the cooks "*might* be employees of Blue Water's Gretna establishment." *Id.* at 6a.

The court of appeals also concluded that, even if the Gretna office was excluded from the requirements of the Act by virtue of the "mom and pop" exception, that did not justify the district court's holding that the Blue Water enterprise as a whole was similarly excluded from the Act. Pet. App. 8a-9a. The court reasoned that "[i]t would be inconsistent with the remedial purposes of the FLSA to attribute the income generated by the work of the cooks on jack-up boats to the [Gretna establishment] and not to [the jack-up boat] establishments and the larger Blue Water enterprise." *Id.* at 8a. According to the court, the "mom and pop" exception, properly construed, excludes from the Act's coverage only "'Mom', 'Pop', their immediate relatives, and the revenues *their* work generates." *Ibid.* Thus, the court of appeals held that the district court erred in finding that the revenues generated by the cooks' work were attributable to the Gretna establishment even though the cooks were employed at separate establishments. *Id.* at 9a.

Accordingly, the court of appeals concluded that under any view of the facts, Blue Water had the requisite $250,000 in non-excluded revenues and thus was subject to the coverage of the Act. "Either Blue Water has one establishment that regularly employs a large number of

unrelated employees, or it is an enterprise with many establishments; one of those establishments is exempt, but the income generated by work performed at its many other establishments should be attributed to the entire enterprise, and therefore count toward the dollar volume requirements of the FLSA." Pet. App. 9a. Accordingly, the court of appeals reversed the district court's finding that Blue Water was not subject to the requirements of the FLSA.[1]

The court of appeals also disagreed with the district court's ruling on the question whether petitioners' cook-employees were "seamen" within the meaning of the FLSA, and accordingly remanded that issue for further consideration. Pet. App. 9a-12a. Noting that "employment solely on seagoing vessels does not necessarily make one a 'seaman' under the FLSA," the court looked to interpretive bulletins issued by the Secretary of Labor in determining whether petitioners' cook-employees constituted "seamen" under the Act. *Id.* at 10a-11a. Under those interpretive bulletins, an employee who "performs both seaman's work and non-seaman's work * * * is a seaman unless his nonseaman's work is substantial in amount," and work is "substantial" if it "occupies more than 20 percent of the time worked by the employee during the work-week." *Id.* at 11a (quoting 29 C.F.R. 783.37).

[1] The district court had also found that the cooks were not individually covered by the FLSA, because they were not engaged "in the production of goods for commerce" within the meaning of 29 U.S.C. 207(a)(1). Pet. App. 16a. The court of appeals found it unnecessary to address that issue, because the court's conclusion that Blue Water was subject to the FLSA as an "enterprise" was sufficient to extend the protections of the Act to Blue Water's cook-employees regardless of the district court's finding concerning the issue of individual coverage. *Id.* at 3a & n.2.

The court acknowledged that "[a] cook is *usually* a seaman because he usually cooks *for* seamen," but noted that in this case it appeared that Blue Water's cooks primarily fed workers who were not themselves seamen. Pet. App. 12a. Accordingly, the court remanded the case in order to permit the district court to determine whether "the cooks spend more than 20% of their time preparing food for non-crew members. If they do, they are not seamen under the FLSA." *Ibid.*

ARGUMENT

Petitioners seek review of an interlocutory judgment of the court of appeals. On remand to the district court, petitioners' cook-employees may be determined to be exempt from the requirements of the FLSA, thus obviating the need for petitioners to seek further review in any court. Accordingly, review should be denied, because petitioners offer no persuasive reason for the Court to depart from its usual practice of declining to review non-final orders of the courts of appeals. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

Moreover, the court of appeals did not clearly err in determining that Blue Water is subject to the requirements of the Act and that Blue Water's cooks are not exempt "seamen" unless they spend no more than 20 percent of their time preparing food for non-crew members. No other court has addressed those issues, and thus the court's decision does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. Petitioners first contend (Pet. 11) that the court of appeals erred in holding that Blue Water's operations are not excluded from the Act by virtue of the "mom and pop" exception. According to petitioners, that holding is inconsistent with the factual record, because the district

court found both that "the Gretna office was an establishment whose only regular employees were the immediate family members of the owner" and that "all of Blue Water's sales are made from the Gretna office establishment." Pet. 11. Petitioners assert that those findings were not overturned on appeal, and thus conclude that Blue Water must be deemed excluded from the requirements of the Act, because those findings indicate both that the Gretna establishment is a "mom and pop" establishment and that none of the sales attributable to the work of the cook-employees may be counted in determining whether Blue Water had the requisite $250,000 in revenues. *Ibid.*

a. Petitioners misapprehend the court of appeals' decision. The court of appeals expressly held that the district court committed legal error in finding that Blue Water's cook-employees were not employees of the Gretna establishment for purposes of the "mom and pop" exception, because the district court failed to look to "economic reality" in determining where those individuals were employed. Pet. App. 6a-7a. As the court of appeals stated, "[i]t was error to deny that [the cooks] *might* be employees of Blue Water's Gretna establishment." *Id.* at 6a.

The court of appeals thus plainly and appropriately discredited the district court's factual finding that only Bedell and his immediate family were employees at Blue Water's Gretna office. It was therefore not bound by that factual determination in reaching its legal conclusions.[2]

b. Petitioners also err in contending (Pet. 11-13) that the court of appeals improperly ignored the district

[2] As the court of appeals pointed out, moreover, there was no need for a remand on that issue to permit the district court to conduct factfinding under the proper legal standard, because Blue Water would be subject to the Act regardless of whether the cooks were employees of the Gretna office. Pet. App. 9a.

court's finding that all of Blue Water's "sales" were made out of the Gretna establishment. The court of appeals reasoned that, even if the Gretna establishment is a separate "mom and pop" establishment, the "revenue" or "income" earned from the work of Blue Water's cooks is not attributable to that establishment, but is instead attributable to other establishments of the Blue Water enterprise, namely, the jack-up boats themselves. Pet. App. 8a-9a. According to petitioners, that reasoning was erroneous, because under the "mom and pop" exception all "sales" of a "mom and pop" establishment must be excluded in determining whether the enterprise satisfies the $250,000 minimum, regardless of where the "revenue" or "income" reflecting those "sales" was actually earned.[3]

The court of appeals' interpretation of the FLSA is not clearly in error, and in the absence of a circuit conflict does not merit review. In the first place, it is well established that exceptions to the Act's requirements "are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); see *Donovan* v. *Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 153 (5th Cir. 1982).

In this case, the court of appeals concluded that crediting Blue Water's sales solely to the Gretna office rather than to the enterprise as a whole would defeat the Act's remedial purposes. Pet. App. 8a. Petitioners' contrary interpretation would permit "any business controlled by immediate family members [to] exclude its employees

[3] In this case, it appears that the total volume of sales, income, and revenues was identical. See Pet. 11 ("the sales made by the Gretna office establishment * * * constituted all sales of Blue Water").

from FLSA coverage by segregating them, even though their labors were the employer's only source of income, from the home office." *Ibid.* It is plain that a substantial loophole would be created if, for example, businesses such as construction companies or repair services, whose employees move from site to site, could evade the FLSA simply by making all their formal sales from an office operated only by family members.

Crediting these "sales" to the entire Blue Water enterprise is also consistent with the legislative history of the "mom and pop" exclusion, which was added to the Act in 1961. Act of May 5, 1961, Pub. L. No. 87-30, § 2(c), 75 Stat. 66. Congress repeatedly referenced small retail and "family-run stores" as the primary example of the kind of establishment that would come within the "mom and pop" exclusion. See, *e.g.*, Staff of Senate Comm. on Education and Labor, 88th Cong., 1st Sess., *Legislative History of the Fair Labor Standards Amendments of 1961*, 581 (Comm. Print 1963); S. Rep. No. 145, 87th Cong., 1st Sess. 45 (1961) ("the bill carefully avoids extending the act's coverage to so-called 'mom and pop' stores in which the only employees are the owner, or persons standing in the relationship of parent, spouse, or child of the owner"); see also *To Amend the Fair Labor Standards Act: Hearings on H.R. 3935 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 1st Sess. 23 (1961) ("we are not covering the mom and pop and family stores") (statement of Arthur J. Goldberg, Secretary of Labor). As noted in the House Report, the intent of the sponsors of the 1961 amendments was "to exclude the small local retail merchants such as the corner grocer, neighborhood drugstore, barbershop, beauty parlor, and the like." H.R. Rep. No. 75, 87th Cong., 1st Sess. 9 (1961). While application of the "mom and pop" exclusion is by no means limited to those examples, it would appear that

in each of them all the "income" or "revenues" or "sales" of the business were a product of the work of the family employees. The court of appeals, therefore, properly viewed the "mom and pop" exclusion "to exclude from coverage only 'Mom', 'Pop,' their immediate relatives, and the revenues *their* work generates." Pet. App. 8a.[4]

2. Petitioners also contend (Pet. 14-18) that the court of appeals erred in holding that Blue Water's cooks are not "seamen" under the Act if they spend more than 20 percent of their time preparing food for non-seamen. The court of appeals' ruling on that issue is, however, correct.

The Act provides an exemption from overtime pay requirements for "any employee employed as a seaman." 29 U.S.C. 213(b)(6). The Secretary's interpretive regulations provide that an employee will "ordinarily" be considered a "seaman" if he is "subject to the authority, direction, and control of the master aboard a vessel" and his service "is rendered primarily as an aid in the operation of such vessel as a means of transportation, *provided he performs no substantial amount of work of a different character.*" 29 C.F.R. 783.31 (emphasis added). The regulations include "cooks" among those considered exempt seamen "if, as is the usual case, their service is of the type described in [29 C.F.R.] § 783.31," but provide

[4] Because the court of appeals' decision attributes to a "mom and pop" establishment all the revenues generated by the family members employed in that establishment, petitioner is wrong in contending that "[t]he use of employees at completely distinct establishments to assist in producing revenue would be enough to defeat application of the exclusion." Pet. 10. Here the court stated that it was "established that the revenues generated by the cooks' work are greater than the statutory minimum for enterprise coverage." Pet. App. 9a. While the basis for that factual conclusion is somewhat unclear, the correctness of the court's fact-bound allocation of "sales" or "income" among various establishments is not an issue that warrants this Court's review.

that seaman status is lost if the cooks perform work "not connected with operation of the vessel as a means of transportation," unless "the amount of such work is not substantial." 29 C.F.R. 783.32. The regulations define "substantial" non-seaman work as that which "occupies more than 20 percent of the time worked by the employee during the workweek." 29 C.F.R. 783.37. Finally, the regulations state the over-arching principle that a seaman's status "depends upon the character of the work he actually performs and not on what it is called or the place where it is performed." 29 C.F.R. 783.33. Petitioners do not challenge the validity of those interpretive regulations.

The Fifth Circuit has previously construed the Secretary's seaman regulations to require "an examination of the nature of the work actually performed by the employees and of the comparative amount of seamen versus non-seamen duties." *Dole* v. *Petroleum Treaters, Inc.*, 876 F.2d 518, 522 (1989). In that case, the court held that workers who spent at least half their time performing maintenance work on offshore oil wells—"a 'nonseamen' duty"—were not exempt seamen under the FLSA. *Id.* at 524. Other courts have applied a similar test in determining whether employees aboard a seagoing vessel are "seamen" exempt from the overtime protections of the FLSA. See, *e.g.*, *Donovan* v. *Nekton, Inc.*, 703 F.2d 1148, 1151-1152 (9th Cir. 1983) (marine technicians aboard an oceanographic research vessel are not exempt seamen because their primary duties are research).

The court here correctly applied the principles established in the Secretary's interpretive bulletins and case law. The principal duty of Blue Water's cooks was the preparation of meals, which obviously is not itself navigational work. Thus, the court's statement that a cook is a seaman "because he usually cooks for seamen" simply recognizes that a cook's seaman status

necessarily derives from the status of those for whom the meals are prepared. The court was therefore correct in concluding that Blue Water's cooks are not exempt seamen unless they spent a predominant amount of their time preparing food for seamen. See, *e.g.*, *Worthington* v. *Icicle Seafoods, Inc.*, 796 F.2d 337, 338 (9th Cir. 1986) (remand to determine if 20 percent of work was non-seaman's work).

Petitioners assert (Pet. 15-16), however, that Blue Water's cook-employees are exempt seamen because they prepare meals for individuals being transported aboard a seagoing vessel.[5] If accepted, that contention would result in the anomaly that cooks could be deemed seamen, exempt from the overtime provisions of the Act, even though they prepared meals only for oil-well service workers and performed no other duties which might otherwise be viewed as seamen's work.[6] Nor is petitioners'

[5] In essence, petitioners seek to import the definition of "seaman" established under the Jones Act, 46 U.S.C. 688, and Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, into the FLSA. See *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807, 817 (1991) (employee is a "seaman" under the former statutes if he contributes to the functioning or mission of the vessel, but need not "aid in navigation or contribute to the transportation of the vessel"). As the court here recognized (Pet. App. 9a), however, the Fifth Circuit has expressly held that the term "seaman" under the Jones Act and FLSA "has different, independent meanings." *Petroleum Treaters*, 876 F.2d at 520-522, 524 (offshore oil maintenance service workers who are clearly Jones Act "seamen" are not exempt "seamen" under the FLSA). Other courts have also recognized that the definition of "seaman" under the FLSA is distinct from its meaning under other statutes. See, *e.g.*, *Walling* v. *Bay State Dredging & Contracting Co.*, 149 F.2d 346, 349 (1st Cir.), cert. denied, 326 U.S. 760 (1945).

[6] Indeed, the seaman exemption was enacted, in part, because of the difficulty in regulating the hours of those aboard ship who must respond to unpredictable conditions at sea. See, *e.g.*, *Anderson* v. *Manhattan Lighterage Corp.*, 148 F.2d 971, 973 (2d Cir.),

argument aided by their reliance (Pet. 17-18) on *Louviere* v. *Standard Dredging Corp.*, 239 F.2d 164 (5th Cir. 1956). In that case, the court held that a deckhand on a tug boat, whose work was indisputably "seaman" in nature, did not lose his seaman status simply because the tugboat towed a dredge carrying non-seamen. Like the court here, the *Louviere* court looked to whether the deckhand's own duties were primarily maritime. *Id.* at 165 (deck hand's "sole employment" was "work entirely of the kind that deckhands do"). Unlike the court below, the *Louviere* court had no need to consider the status of those benefiting from the deck hand's services because the deckhand's work was, in the first instance, maritime in nature. Even if there were some tension between *Louviere* and the decision below, moreover, review would not be warranted to correct that intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).[7]

cert. denied, 326 U.S. 722 (1945); *Helena Glendale Ferry Co.* v. *Walling*, 132 F.2d 616, 619 (8th Cir. 1942). That underlying purpose would obviously not be served by extending the exemption to petitioners' cook-employees.

[7] Petitioners' reliance (Pet. 17-18) on *Donovan* v. *Nekton, Inc.*, 703 F.2d 1148 (9th Cir. 1983), and *Marshall* v. *Woods Hole Oceanographic Inst.*, 458 F. Supp. 769 (D. Mass. 1978), is similarly misplaced. Although it appears that overtime compensation for seagoing cooks was not sought in those cases, the courts' opinions are silent as to the pay status and duties of the cooks. Thus, no inferences of any relevance to this case can be drawn from those decisions.

Similarly, petitioners' prediction (Pet. 14) that the decision below will lead to economic ruin for passenger-carrying vessels is wholly unsubstantiated. The record contains no evidence of labor practices in the cruise industry, and in any event this case does not involve the question whether cooks who provide services for cruise-vessel passengers are seamen for purposes of the FLSA.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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